RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BILLS AND NOTES — LIABILITY OF INDORSER OF NON-NEGOTIABLE NOTE. — The defendant signed his name on the back of a non-negotiable note before delivery to the payee. The question arose whether he was affected by a stipulation in the note whereby indorsers waived presentation, protest, and notice. *Held*, that he was not affected, because his liability was not that of an indorser, but of a surety or joint promisor, who is liable without notice of default by his principal. *Pool* v. *Anderson*, 18 N. E. Rep. 445 (Ind.).

In Indiana such a signature on the back of a negotiable note would make the signer liable, presumptively, as an indorser. The court, in this case, refused to apply the same rule to a non-negotiable note, because one cannot be an indorser, in a commercial sense, of non-negotiable paper. The question naturally arises, why does the nature of the contract depend upon negotiability? It would seem that the intention, in either case, is merely to become a surety. The courts are in inextricable confusion as to the liability of the "anomalous indorser," as he has been called. See 1 Ames, Bills and Notes, 269, *note*, for a full collection of cases.

COMMON CARRIERS — CONNECTING LINES — INJURIES TO PASSENGERS. — Defendant issued round-trip excursion tickets to a point on a connecting line. The train was, by contract between defendant and the connecting line, taken over the connecting line by the latter's engine and in charge of its employees. *Held*, that employees were *pro hac vice* defendant's employees, and that defendant was answerable in an action founded on their negligence on the connecting line. *Washington* v. *Raleigh & G. R. Co.*, 7 S. E. Rep. 789 (N. C.).

The doctrine of this case has been denied in *Sprague* v. *Smith*, 29 Vt. 421. See also *Straiton* v. *N. Y. & N. H. R.R.*, 2 E. D. Smith, 184.

In accord with the principal case see *Great Western Ry.* v. *Blake*, 7 H. & N. 987; *Buxton* v. *North Eastern Ry.*, L. R. 3 Q. B. 549; *Thomas* v. *Rhymney Ry.*, L. R. 6 Q. B. 266.

In Massachusetts the question seems to be an open one. See *Schopman* v. *B. & W. R.R.*, 9 Cush. 24, 29.

COMMON CARRIERS — GOODS DELAYED BY STRIKE. — A railroad company is not liable for damage caused by delayed freight, where the cause of the delay is an organized strike, which neither the railroad company nor the civil authorities can control. *Haas* v. *Kansas City, F. S. & G. R. Co.*, 7 S. E. Rep. 629 (Ga.).

CONSTITUTIONAL LAW — CHINESE EXCLUSION ACT OF 1888. — The petitioner, a Chinese laborer, had in his possession a return certificate issued by the United States government. At the time that the Chinese exclusion act became a law — Oct. 1, 1888 — he was on the high seas *en route* for California; and, on his arrival at San Francisco, was denied admittance to the United States. It was urged that the act was unconstitutional as depriving petitioner of a vested right, and as being an *ex post facto* law. *Held*, that the act applied to petitioner; that the return certificate was not a contract giving a vested right, but simply evidence to identify a person entitled to privileges provided for in our treaties with China; and that the act was not an *ex post facto* law, because a Chinaman's departure from the country is not made, and is not in the nature of, an offence. *In re Chae Chau Ping*, 36 Fed. Rep. 431 (Cal.).

CONSTITUTIONAL LAW — EMINENT DOMAIN — TAKING PROPERTY WITHOUT COMPENSATION. — The act of Congress of Aug. 1, 1888, authorizes designated government officers to acquire for the United States, by condemnation, real estate for the erection of public buildings, and confers upon the United States Circuit and District Courts jurisdiction of the condemnation proceedings, but does not provide for compensation to the owner. *Held*, that the act is not in conflict with the clause of the Constitution of the United States declaring that private property

shall not be taken for public use without just compensation, as the act must be read with the Constitution, and it must be assumed the courts will not award process of condemnation unless compensation be provided for. *In re Rugheimer*, 36 Fed. Rep. 369 (S. C.).

CONSTITUTIONAL LAW — EX POST FACTO LAWS — ACT VOID IN PART. — The rule laid down in Cooley's Const. Lim. (5th ed.) 215, that "a general law for the punishment of offences, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control," is cited as the *ratio decidendi* in *Jaehne* v. *People of New York*, 9 Sup. Ct. Rep. 70; s. c. 16 Wash. L. Rep. 763.

CONSTITUTIONAL LAW — LEGISLATIVE ACT DEPRIVING MUNICIPALITIES OF POLICE POWER. — An act of the Massachusetts Legislature, providing that the police of the city of Boston shall be put under the control and management of a board of police appointed by the Governor of the State, is a constitutional exercise of legislative power. Under the State Constitution giving the Legislature power to establish a municipal government in any city or town, to grant privileges and immunities to its citizens, and to pass all laws the Legislature judges to be for the "good and welfare" of the Commonwealth, "the powers and duties of all the towns and cities, except so far as they are specifically provided for in the Constitution, are created and defined by the Legislature," and subject to its control. The act in question violates no provision of the Constitution, and the court "cannot declare an act of the Legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision in the Constitution." *Com.* v. *Plaisted*, Mass. Sup. Ct. Rescript of Jan. 6, 1889.[1]

See Cooley's note on "Local Self-Government," 1 Story on the Constitution, 4th ed. § 280, the general tendency of which is in conflict with the doctrine of *Com.* v. *Plaisted*. So long, it is said, as municipal corporations for local self-government exist, "though the State may lay down rules for the regulation of their affairs and the management of their property, it is nevertheless a part of the right of self-government that the people concerned should choose their own officers who are to administer such rules and have the care of such property, and the State cannot appoint such officers, as it might those who are to perform duties of a more general nature for the public at large." *Ibid.*, p. 197, and cases cited.

CONSTITUTIONAL LAW — PATENTS — SUIT BY GOVERNMENT TO SET ASIDE FOR FRAUD. — A suit will lie by the United States government in the United States Circuit Courts to set aside a patent for an invention, on the ground that it has been obtained by fraud. The analogous cases establishing that the United States government has the right to bring suit in its own courts to set aside land patents issued by the government, obtained by the fraud of the patentee, rest either upon the ground that the government has a direct pecuniary interest in the result, or that it is under an obligation to bring the suit, either to an individual who will be thereby benefited, or to the public. "The essence of the right of the United States to interfere in the present case is its obligation to protect the public from the monopoly of the patent which was procured by fraud." *United States* v. *Bell Telephone Co.*, 9 Sup. Ct. Rep. 90; s. c. 38 Alb. L. J. 473.

CONSTITUTIONAL LAW — RIGHT TO JURY TRIAL. — A statute which extends the jurisdiction of a court of equity to quiet titles to cases where the lands are unoccupied is not unconstitutional as depriving the defendant of the right to trial by jury secured by the Constitution, for such constitutional provision extends only to cases where the common-law trial by jury was customary, and at common law ejectment did not lie where defendant was not in possession. *Grand Rapids & I. R. Co.* v. *Sparrow*, 36 Fed. Rep. 210 (Mich.).

CONSTITUTIONAL LAW — STATUTE IMPAIRING OBLIGATION OF CONTRACTS. — A statute of the United States gave the United States the right to sue in tort for the cutting of certain timber on public lands. Under this statute a cause of action accrued against defendant, but no suit was brought until after the statute was repealed. *Held* (*semble*), that the repeal of the statute did not take away this right to sue defendant in tort, for defendant's obligation might be

[1] [19 N. E. Rep. 224.]

regarded as contractual, since the tort could be waived and assumpsit brought, and the Constitution forbids the passage of any law impairing the obligation of contracts. *United States* v. *Williams*, 19 Pac. Rep. 288 (Mont.).

CONTRACT — ACCEPTANCE OF OFFER BY TELEGRAM. — A contract made by telegraph is completed when a telegram accepting an offer is despatched. *Cowan* v. *O'Connor*, 20 Q. B. D. 640 (Eng.).

This case is, in effect, one more authority added to the list in support of the proposition that a contract is complete on the mailing of the letter accepting an offer. *Household Ins. Co.* v. *Grant*, 4 Ex. D. 216. See 1 HARV. LAW REV. 146, for a moot-court decision by Prof. Frederick Pollock in support of this view. The theoretical objections to this view are clearly stated in Langdell's Sum. of the Law of Contracts, §§ 6–16, with a full discussion of the authority *pro* and *con*.

CONTRACT — CONSIDERATION — PART PAYMENT OF DEBT. — The doctrine of *Foakes* v. *Beer*, 9 App. Cas. 605, that the payment by a debtor of part of a debt actually due is not a good consideration for a contract not to take proceedings for the recovery of the residue, is not applicable to a case where a solicitor gave his personal check for part of the sum due from his client to another; because here there is something which can be a "new and different benefit to the person entitled to the larger sum of money," and there is, therefore, sufficient consideration for an accord and satisfaction. *Bidder* v. *Bridges*, L. R. 37 Ch. D. 406.

The case is criticised in 4 Law Quart. 368, as frittering away the rule laid down in *Foakes* v. *Beer*.

CONTRACT FOR THE SALE OF LAND — DEVISE OF THE LAND TO VENDEE — SPECIFIC PERFORMANCE. — Defendant contracted to buy land of plaintiff's testator, but before conveyance or payment of the purchase-money, the testator died, devising the land to defendant and another equally. *Held*, that the devise having been assented to by defendant, superseded, and so relieved defendant from all liability under, the contract. *Taylor* v. *Hargrove*, 7 S. E. Rep. 647 (N. C.).

CONTRACT — SPECIFIC PERFORMANCE. — The vendee of land, which was situated in another State, agreed to give his note for the purchase-price and to secure it by mortgage on the land. After conveyance of the land he refused to give the note and mortgage. *Held*, that vendee's promise may be enforced in equity, on the ground that the remedy at law is inadequate. — *Hicks* v. *Turck*, 40 N. W. Rep. 339 (Mich.).

DEEDS — QUITCLAIM DEED IN CHAIN OF TITLE — BONA FIDE PURCHASER. — A guarantee in a warranty deed, whose grantor has a warranty deed, and who acts in good faith and without actual notice, is entitled to protection as a *bona fide* purchaser, notwithstanding the existence of a quitclaim deed in the chain of title. *Sherwood* v. *Moelle*, 36 Fed. Rep. 478 (Neb.).

EVIDENCE — WRITINGS — CONDITION PRECEDENT PROVED BY PAROL. — In an action on a written agreement to raft logs, it was *held* not permissible to show by oral evidence that the logs were not to be rafted until the plaintiff furnished the necessary rafting gear. *Meekins* v. *Newberry*, 7 S. E. Rep. 655 (N. C.).

It is generally held permissible to prove by oral evidence a separate oral agreement constituting a condition precedent to any liability under a written contract. See Steph. Dig. Ev. § 90 (3), and cases cited.

FRAUDULENT CONVEYANCES — INSURANCE POLICIES — RIGHTS OF CREDITORS AGAINST BENEFICIARIES. — Insurance taken out by a husband upon his own life for the benefit of his wife and children, in jurisdictions where the proceeds may enure to her or their separate use, cannot be recovered by such creditors, although the husband was insolvent when the policies were issued, and the premiums were paid out of his own money, since such insurance is taken upon the interest of the wife and children in the husband's life. Nor can creditors recover out of the proceeds of such policy the amount of the premiums so paid, unless there is proof of actual fraud on the part of the wife or the insurance company, or the provision for the family is excessive. *Cent. Nat. Bank* v. *Hume*, 9 Sup. Ct. Rep. 41; s. c. 16 Wash. L. Rep. 777.

This, say the court, is not like the case where a husband, having insured his own life for benefit of himself, his executors, etc., subsequently assigns this policy to his wife and children, such assignment by an insolvent husband being in fraud of creditors. The husband here does not insure his own interest in his life, but takes out the policy on the insurable interest which his wife and children have in his life; he virtually gives his wife and children the annual

premiums that they may insure their interest in his life; such gift of annual premiums to his wife and children, not materially reducing the creditors' chance of recovering their debts, is not in fraud of creditors, unless there be actual fraud or an unreasonable provision. An insolvent husband has a right to make reasonable expenditures for the support of his wife and children while he is living; by analogy he has a right to make a reasonable outlay to secure their maintenance after his death.

HIGHWAYS — DEDICATION. — A grantor of land described the premises in his deed to defendant as bounded on certain streets. There were no streets at the place designated, but only unenclosed strips of land belonging to the grantor, which the public used as streets for more than five years subsequent to the grant. *Held*, a complete dedication and acceptance of the streets. *City of Eureka* v. *Croghan*, 19 Pac. Rep. 485 (Cal.).

HIGHWAYS — RIGHT OF ABUTTERS TO LIGHT AND AIR — USE OF STREET BY RAILROAD.—*Held*, that appropriating a public street to the construction and operation of an ordinary commercial railroad upon it, is not a proper street use; that it is an interference with a lot-owner's easement to light and air, which amounts to a taking of his property within the meaning of the Constitution; and that the lot-owner may recover whatever damages are thus caused to his lot. *Adams* v. *Chicago, B. & N. R. Co.*, 39 N. W. Rep. 629 (Minn.).

INSURANCE, FIRE — CONDITIONS AGAINST INCENDIARISM — Plaintiff insured his premises in the defendant company, a condition in the policy providing that it should not cover any loss "occasioned by or in consequence of incendiarism." The owner of the adjoining premises feloniously set fire to his house, and the fire spreading burned the plaintiff's premises. *Held*, that the plaintiff could not recover on the policy. "The word 'incendiarism,' as used in the condition in question, . . . includes any act of incendiarism wherever committed, which directly causes the loss or damage sued for." *Walker* v. *London & Prov. F. Ins. Co.*, Irish Exch. Div., Nov. 7, 1888; reported in 38 Alb. L. J. 471.

LARCENY — OBTAINING POSSESSION BY FALSE PRETENCE. — Defendant ordered an overcoat and pantaloons of a tailor. Afterwards, in the absence of the tailor, at the request of defendant, an employee gave the garments to defendant and accompanied him to his room to receive the pay for them. At the foot of a flight of stairs defendant asked the employee to wait for him while he went up to get his key, and disappeared, but did not return. *Held*, that he was guilty of larceny. *State* v. *Hall*, 36 Fed. Rep. 107 (Iowa).

MALPRACTICE — CLAIRVOYANTS. — In an action against a clairvoyant physician for malpractice, the court was asked to charge, that if at the time defendant was called to treat the plaintiff, both parties understood that he would treat him according to the approved practice of clairvoyant physicians, and that he did so treat him with the ordinary skill and knowledge of the clairvoyant system, plaintiff could not recover. *Held*, that the request to charge was properly refused. Instead of the words "with the ordinary skill and knowledge of the clairvoyant system," the instructions should have read, "with the ordinary skill and knowledge of physicians in good standing practising in that vicinity." One who holds himself out as a healer of diseases must, no matter to what particular school or system he belongs, be held to the duty of reasonable skill, in the light of the present state of medical science. *Nelson* v. *Harrington*, 40 N. W. Rep. 228 (Wis.).

MARRIAGE AND DIVORCE — JUDICIAL SEPARATION CANNOT BE GRANTED TO PARTY GUILTY OF ADULTERY. — Where, on a petition by a wife for a dissolution of marriage on the ground of cruelty and adultery, the husband, in a cross-petition, charged the wife with adultery, and all the mutual charges were sustained by the evidence, *held*, that as the wife had been guilty of adultery, the court could not grant her a decree of judicial separation. *Otway* v. *Otway*, Court of Appeal (Eng.), May 8, 1888; noted in 85 Law Times, 27, and Weekly Notes, 1888, p. 117.

Drummond v. *Drummond*, 30 L. T. 117, P. & M., approved; *Otway* v. *Otway*, 13 Prob. Div. 12, reversed.

NEGLIGENCE — BARE LICENSEE. — Acts done by the owner of fixed property on his premises, which would be actionable negligence if done on the highway, do not necessarily put him under liability to bare licensees, whom he had no reason to know were on the premises. Thus, although a runaway horse on the highway

is *prima facie* evidence of negligence (*Watson* v. *Weeks*, unreported), the careless act of a farm servant, causing a farm horse to run away and knock down a visitor crossing the farm, does not render the farmer liable to the visitor for any breach of duty. *Tolhausen* v. *Davies*, 57 L. J. Q. B. 392; noted in 4 Law Quart. 488.

See *Corby* v. *Hill*, 4 C. B. N. S. 556, and note, for cases on duty of owner of premises to bare licensees.

NEGLIGENCE — IMPUTED NEGLIGENCE. — The plaintiff was injured by being thrown out of a vehicle driven by a person who had invited her to drive, whose efficiency she had no reason to doubt, and over whom she had no control. *Held*, that his negligence was no bar to her recovery against the town for a defect in the highway. *Town of Knightstown* v. *Musgrove*, 18 N. E. Rep. 452 (Ind.).

The court denied the doctrine of *Thorogood* v. *Bryan*, 18 C. B. 115. The case of *The Bernina*, 12 P. Div. 58, 57 L. J. Rep. Q. B. 65, was not cited. See 2 HARV. L. REV. 140; and see, also, *Hoag* v. *R. R. Co.*, 18 N. E. Rep. 648 (N. Y.).

NEGLIGENCE — VOLENTI NON FIT INJURIA. — In an action for negligence against a railway company for injuries sustained by the plaintiff in falling down steps leading to the platform of the railway station, which were in a dangerous condition, it was *held* that an admission by the plaintiff, on cross-examination, that he thought it was dangerous to go down the steps, was not sufficient to entitle the defendants to succeed on the ground that the maxim *volenti non fit injuria* applied, but that the *onus* of proof lay upon the defendants to show that the plaintiff "freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it," and to establish the fact that the maxim applied. *Osborne* v. *London & N. W. Ry. Co.*, 59 L. T. Rep. N. S. 227 (Eng.); S. C. 38 Alb. L. J. 460.

The authority of *Thomas* v. *Quatermaine*, 18 Q. B. D. 685, is questioned.

SALE — WARRANTY — RECOUPMENT OF DAMAGES. — A warranty by the vendor of a printing-press, that the machine will work "satisfactorily," does not entitle the vendee to recoup damages in an action against him for the price. If the covenant had been that the press should work well, the ordinary rule would have applied, and the damages would have been the difference in value between a press which would work reasonably well, and that which was actually furnished; but it is impossible to fix the value of a machine which would work to the "satisfaction" of defendant. *Campbell Printing-Press Co.* v. *Thorp*, 36 Fed. Rep. 414 (Mich.).

The opinion contains a very excellent discussion of the authorities on sales with warranties.

TRUSTS — CONSTRUCTIVE TRUSTS — PURCHASE BY ATTORNEY OF OUTSTANDING TITLE. — An attorney, employed to prepare an abstract of title to land about to be sold by his client, discovered a defect which he concealed. The land was conveyed to the proposed purchaser by a warranty deed. The attorney then, by false representations, procured from the proper parties the legal title for himself. *Held*, that he could not maintain ejectment, since he was a constructive trustee of the legal title for his client's grantee. *Downard* v. *Hadley*, 18 N. E. Rep. 457 (Ind.).

It is doubtful whether the trust was based on a duty owed by the attorney to the grantee, or whether it was based on the client's equity against the attorney, to which the grantee became entitled by virtue of the warranty.

WATERS AND WATERCOURSES — RIGHT OF THE STATE IN GREAT PONDS. — The State of Massachusetts authorized by statute the city of Fall River to take so much water from a pond called "Watuppa Pond," that owners of land bordering on a natural stream flowing therefrom were greatly damaged. It was *held* that the "Colony Ordinance of 1647," providing that householders shall have free fishing and fowling in any great ponds over ten acres in size within the precincts of the town, and may pass and repass on foot through any man's land, so that they trespass not on corn or meadow land, vests in the State both the *jus publicum* and the *jus privatum* in great ponds, so that it can devote their waters to a public use without compensation to those injured thereby. *Watuppa Reservoir Co.* v. *City of Fall River*, 18 N. E. Rep. 465 (Mass.).

For a criticism of this case see "The Watuppa Pond Cases," 2 HARV. L. REV. 195. It should be noticed that the statement, made by Chief Justice Morton in his opinion, that by Statute of 1869, c. 384, the State of Massachusetts

released its proprietary right in great ponds under twenty acres in size to the owners of the shores, seems not strictly correct, since the statute purports to release only the right of fishery in such ponds. See P. S. c. 91, §§ 10, 11 and Statute of 1888, c. 318. "Great ponds" appear to remain those over ten acres in size, according to the Colony Ordinance of 1647.

REVIEW.

SELECT PLEAS OF THE CROWN. Vol. I., A.D. 1200–1225. Edited for the Selden Society, by F. W. Maitland. London: Bernard Quaritch. 8vo. xxx and 164 pages.

The Selden Society and its editor are to be congratulated upon the first fruits of this new organization. The work of Mr. Maitland is of the high degree of excellence that was to be expected from the editor of Bracton's Note Book. The translation of the Latin text is especially successful.

Of the many points of historical interest, only one or two can be here indicated. Originally, actions for a battery or for an asportation of chattels were determined by wager of law in the popular courts of the hundred and county. With the growth of the feudal state these actions, except in case of a trivial battery, became convertible, by the addition of the words *feloniter, vi et armis*, and *contra pacem regis* (or *ducis*), into appeals of felony, determinable by wager of battle in the royal courts. Later, by the omission of *feloniter*, the appeal became the familar action of trespass, with trial by jury. The book before us shows that trespass *quare clausum fregit* had a different course of development. From case No. 35 it appears that there was no appeal of felony for a simple entry upon land unaccompanied by a battery of the occupant, or an asportation of his chattels. Such an entry, like a trivial battery, was, doubtless, regarded as too slight an offence to be visited with the penalties of felony. On the other hand, after trespass became concurrent with the appeal of felony for a battery or asportation, it was but natural to admit trespass *quare clausum fregit* in the *curia regis*, in competition with the similar action in the popular courts.

Cases Nos. 88, 105, and 126 (see also 3 Bracton's Note Book, case No. 1664) make it plain that the much-quoted rule, "A bailee may sue a wrongdoer because he is liable over to his bailor," was an established doctrine at the beginning of the thirteenth century. It seems, also, that in England, as upon the Continent, the bailor could not, in early times, sue the wrongdoer. The bailee had the chattels, the bailor had but a right to have them. In other words, the bailee could, and the bailor could not, prove that the chattels, when taken, were '*sua*.' By regarding the possession of the bailee at will as the possession of the bailor, the courts, in the time of Edward III., gave the bailor also a right of action against the wrongdoer.

J. B. A.